IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATTY L. SCHUMACHER	:	CIVIL ACTION
	:	
v.	:	
	:	
SOUDERTON AREA SCHOOL DIST.	:	NO. 99-1515
and LOWELL A. TINNER	:	

MEMORANDUM

Giles, C.J. January ___, 2000

Patty L. Schumacher ("Schumacher") brings this action for damages and other relief against the Souderton Area School District ("District") and Superintendent Lowell A. Tinner ("Tinner"), alleging employment discrimination based on her disability, in violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and the Pennsylvania Human Relations Act ("PHRA), 43 Pa. C.S. § 951 et seq., and based on her age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the PHRA; violations of her rights under the Fourteenth Amendment of the United States Constitution; and breach of a collective bargaining agreement ("CBA"). Before this court is the Defendants' Partial Motion to Dismiss Plaintiff's First Amended Complaint. For the reasons that follow, the motion is granted in part and denied in part.

Background

Factual Background

This court accepts, for purposes of this motion, all the factual allegations of the complaint as true and draws all reasonable inferences from them in the light most favorable to Schumacher. Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997). According to the Amended Complaint, Schumacher is 51 years old and suffers from Attention Deficit Hyperactive Disorder

("ADHD"), a mental condition that limits her in various activities, including cognitive thinking, sleeping, and eating. For approximately fourteen years, beginning in 1983, Schumacher has been employed by the District as a teacher, first teaching math and other subjects at the elementary school level, and then teaching only math at the middle school level. Tinner is the District superintendent and Schumacher's supervisor. Schumacher is a member of the Souderton Area Education Association ("Union") and the terms and conditions of her employment at all times were governed by the provisions of the CBA between the union and the district. The CBA expressly prohibits discrimination based on, inter alia, age and handicap and provides for arbitration of "[t]hose grievances which require an interpretation and application of the contract." (CBA III.B.1.a). Grievance is defined as "a claim based upon an event or condition which affects the conditions or circumstances under which a teacher works, allegedly caused by a misinterpretation or inequitable application of the terms of the contract." (CBA III.A).

In or about May 1996, Schumacher informed the District that she suffered from ADHD. Sometime thereafter, but apparently beginning in the 1997-98 academic year, the District transferred Schumacher from teaching math to teaching geography at the middle school. The District also has refused to allow her to attend seminars on teaching math and has refused to allow her to regain, or be considered for, a position teaching math, despite her being certified and qualified to do so. Although Schumacher does not earn less as a geography teacher than she would as a math teacher,[1] she does allege that teaching math carries with it certain private

[1] Indeed, ¶ 12 of the Amended Complaint avers that Schumacher's salary has increased every year from 1996-97, when she earned $62,179 to 1999-2000, when she is to earn $72,000. Her salary increased between her last year of teaching math and her first year of teaching geography. The Amended Complaint does not suggest that the amount of her raises was less because she is teaching geography rather than math.

employment opportunities, consulting jobs, and prestige that teaching geography does not and that she has been denied opportunities and advantages as a result of the discriminatory transfer. The transfer is alleged to be an adverse employment action. She also alleges that the District has engaged in conduct that has made it difficult for her to perform effectively in her new position, by failing to provide her with training, materials, and support; by interfering with her ability to take her prescribed medication; and by treating her differently from other teachers in the terms and conditions of employment because of her condition.

Following her transfer to teaching geography, Schumacher filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC"). Thereafter, the District allegedly took certain actions against her in direct retaliation for filing the discrimination charges. These actions include denying her the opportunity to apply for and to be considered for new math-teaching positions on par with other applicants, as well as placing burdens on her in her current teaching position. These burdens include compelling her to come to work while ill, interfering with her teaching duties, refusing to allow her to attend seminars that would enhance her teaching performance, and failing to provide her with the materials, time, space, and support necessary for her to perform her job well and effectively. She also alleges that other teachers, who have not filed similar discrimination charges, have received such assistance and support.

Procedural History

Schumacher received a right-to-sue letter from the EEOC dated January 5, 1999. On March 26, 1999, she filed a pro se complaint in this court against the District and Tinner. In July, the defendants moved to dismiss the complaint for failure to state a claim, pursuant to Fed. R.

Civ. P. 12(b)(6), or in the alternative for a more definite statement, pursuant to Fed. R. Civ. P. 12(e). In August, Schumacher obtained an attorney and moved to amend her complaint. By Order Dated September 1, 1999, Schumacher was granted leave to file an amended complaint and the defendants' motion to dismiss was denied as moot.[2]

Schumacher filed an Amended Complaint, asserting five counts: 1) employment discrimination based on disability, in violation of the ADA and PHRA; 2) employment discrimination based on age, in violation of the ADEA and PHRA; 3) violations of her rights to equal protection and procedural and substantive due process under the Fourteenth Amendment, brought pursuant to 42 U.S.C. § 1983; 4) improper retaliation under the ADA; and 5) breach of the CBA. Schumacher seeks compensatory and punitive damages and other relief, including reinstatement to her position as a math teacher. The instant motion followed.

Discussion

This court has federal question jurisdiction over Schumacher's federal constitutional and statutory claims, pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over her state statutory and common law claims, pursuant to 28 U.S.C. § 1367(a). Venue is proper in this judicial district in that both defendants may be deemed to reside in this district and the events giving rise to Schumacher's claims occurred in this district. 28 U.S.C. §§ 1391(b)(1), (2).

The instant motion seeks dismissal only of portions of the Amended Complaint.

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[2] Since the defendants' Rule 12 motion did not constitute a responsive pleading under Fed. R. Civ. P. 15(a), Schumacher did not require leave of court to amend her complaint. She was authorized by the Rules to file the amended pleading as a matter of course. Centifanti v. Nix, 865 F.2d 1422, 1431 & n.9 (3d Cir. 1989); Fed. R. Civ. P. 15(a). Because Schumacher requested leave, however, this court was required to treat the case as one in which such leave was required. Centifanti, 865 F.2d at 1431.

Defendants do not challenge the legal or factual sufficiency of the allegations against the District as to the ADEA[3] and § 1983 claims or against Tinner as to the § 1983 claims. The motion raises several discreet, distinct arguments, which this court addresses in turn.

ADA and ADEA Claims as to Tinner

Tinner argues that as an individual he cannot be liable either under the ADA or ADEA, thus the federal discrimination claims against him must be dismissed. This court agrees and dismisses the ADA, ADA retaliation, and ADEA claims as to Tinner with prejudice.

Under the ADA, employer means "a person engaged in an industry affecting commerce . . . and any agent of such person." 42 U.S.C. § 12111(5)(A). The statute is silent as to the present issue of whether that definition provides for a supervisor, such as Tinner, to be held personally liable for damages or whether damages only may be had against the District as Schumacher's actual employer.

Neither the Supreme Court nor the third circuit has addressed this issue directly. However, the third circuit has addressed the question of individual liability under Title VII and, in agreement with most other courts of appeals, has held that Congress did not intend to hold individual employees personally liable under Title VII. Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996), cert. denied, 521 U.S. 1129 (1997); see id. at 1077 (citing cases). The third circuit also has held that "the ADA, ADEA, and Title VII all serve the

[3] During the pendency of this motion, the United States Supreme Court held that states are not subject to suit under ADEA because Congress lacked the power pursuant to § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity for claims of age discrimination. Kimel v. Florida Bd. of Regents, ___ S. Ct. ___, 2000 WL 14165, *3 (2000). However, the District is a local governmental entity and is not entitled to assert Eleventh Amendment immunity from suit in federal court. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977).

same purpose–to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under one statute should inform the standards under the others as well." Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div., 60 F.3d 153, 157 (3d Cir. 1995); see id. (noting that the allocations of the burdens of proof and persuasion under the ADA are informed by the ADEA and Title VII).

It follows, therefore, that the availability of individual liability should be the same under any of the three statutes. See Metzgar v. Lehigh Valley Hous. Auth., Civ. No. 98-3304, 1999 WL 562756, *3 (E.D. Pa. 1999) (Kauffman, J.) (quoting Meara v. Bennett, 27 F. Supp. 2d 288, 290 (D. Mass. 1998)) ("It makes sense, therefore, to treat the issue of individual liability the same under the ADA and Title VII."). Because there is no individual liability under Title VII, there is no individual liability under the ADA and the claims under that statute must be dismissed as a matter of law as to Tinner. This court concurs with the uniform holding of courts within this judicial district. See Metzgar, 1999 WL 562756, at *3; Fullman v. Philadelphia Int'l Airport, 49 F. Supp. 2d 434, 441 (E.D. Pa. 1999) (Robreno, J.); Brannaka v. Bergey's, Inc., Civ. No. 97-6921, 1998 WL 195660, *1 (E.D. Pa. 1998) (Kelly, J.).

This court reaches the same conclusion as to the ADEA claims, because the "same reasoning for excluding individual liability under the ADA and Title VII applies to the ADEA." Moore v. Acme Corrugated Box Co., Inc., Civ. No. 97-2150, 1997 WL 535906, *2 (E.D. Pa. 1997) (Broderick, J.). The ADEA claim against Tinner individually also fails as a matter of law and is dismissed with prejudice.

Although it is not clear from the motion whether Tinner makes this argument, this court makes clear that this dismissal is only as to the ADA, ADA retaliation, and ADEA portions of

the Amended Complaint. The claims against Tinner for age discrimination, disability discrimination, and retaliation under the PHRA remain in this case and Schumacher may proceed with those claims. The PHRA prohibits discrimination in employment based on age or non-job-related handicap or disability, 43 Pa. C.S. § 955(a), and based on the opposition to acts forbidden by the act or the making of a charge under the act. 43 Pa. C.S. § 955(d). These substantive provisions generally are applied in accordance with their federal counterparts. Salley v. Circuit City Stores, Inc., 160 F.3d 977, 979-80 n.1 (3d Cir. 1998) (citing Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996)).

However, Pennsylvania law goes one step beyond the federal statutes and expressly makes it unlawful for any "employe, to aid, abet, incite, compel or coerce the doing of any act declared . . . to be an unlawful discriminatory practice." 43 Pa. C.S. § 955(e). A supervisor who himself engages in discriminatory conduct is an employee under § 955(e) and may be liable for aiding and abetting violations of the PHRA. See Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 553 (3d Cir. 1996); Metzgar, 1999 WL 562756, at *5. The Amended Complaint alleges that Tinner recommended, carried out, and enforced many of the actions that constitute discrimination under the PHRA. For example, in ¶ 16 of the Amended Complaint, Schumacher alleges that Tinner recommended that she be transferred from teaching math to teaching geography. Such conduct, if proven to have been for discriminatory or retaliatory purposes, would constitute aiding and abetting under the state statute. See Dici, 91 F.3d at 553. The state-law discrimination claims against Tinner remain in the case.

Arbitration of All Claims

The District's primary argument is that Schumacher's claims for disability discrimination,

civil rights violations, and breach of contract all should be dismissed without prejudice and that Schumacher should be required to submit all of her claims to binding arbitration pursuant to the grievance procedures established by Article III of the CBA. The CBA defines grievance as "a claim based upon an event or condition which affects the conditions or circumstances under which a teacher works, allegedly caused by a misinterpretation or inequitable application of the terms of the contract." (CBA III.A). The agreement calls for binding arbitration of "[t]hose grievances which require an interpretation and application of the contract," (CBA III.B.1.a), but not of grievances not covered in III.B.1, in other words, grievances not requiring an interpretation and application of the contract. (CBA III.B.2).

As a threshold matter, the fact that the District included the CBA as an exhibit to its motion to dismiss does not preclude this court from considering the agreement and still addressing the motion as one to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) rather than converting it to a motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). See Rose v. Bartle, 871 F.2d 331, 340 (3d Cir. 1989) (discussing procedure and notice requirements for converting a Rule 12 motion to a Rule 56 motion). It is well established that this court may consider an indisputably authentic document, such as this contract, attached to a motion to dismiss if the plaintiff's claims are based upon that document. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994). Here, Schumacher alleges that the terms and conditions of her employment were governed by the CBA and the District argues that her claims are based on the CBA and that the CBA requires their dismissal. Therefore, the CBA will be considered in deciding the 12(b)(6) motion.

The CBA expressly limits the arbitration requirement to grievances that require an interpretation and application of the contract. Schumacher's claim that the District breached the terms of the CBA by having her teach geography instead of math is a claim requiring such contractual interpretation and application and that claim must be submitted to arbitration pursuant to the CBA. Thus, Schumacher's breach of contract count (Count V) must be dismissed without prejudice to Schumacher's right to grieve the issue in binding arbitration.

It is not clear, however, that either her constitutional or statutory discrimination claims require contractual interpretation and application so as to be subject to the arbitration provision. The question of whether the District violated the ADA by transferring Schumacher or otherwise changed the terms and conditions of her employment because she suffers from ADHD or because she filed an EEOC charge likely can be resolved without reference to the CBA. The same is true for the question of whether the District violated Schumacher's Fourteenth Amendment rights. These causes of action arise from the ADA and the United States Constitution and are distinct from any right conferred by the CBA. See Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391, 396 (1998). This court therefore rejects the District's argument and holds that these claims are not arbitrable based solely on the limiting language of the CBA itself. Even assuming arguendo that the claims do require contractual interpretation so as potentially to be arbitrable, the District's argument still must fail because this court holds that the CBA did not expressly and properly waive Schumacher's right to a federal forum for her statutory and constitutional claims. Therefore, this court will not dismiss the ADA or § 1983 claims for failure to arbitrate under the CBA.

Waiver of ADA Claim

In its most recent statement on this issue, the Supreme Court held that a union-negotiated waiver of employees' right to a federal judicial forum for statutory claims of employment discrimination can be valid only if it is "clear and unmistakable." Wright, 119 S. Ct. at 396. Instead, "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." Id. Therefore, a union-member employee was not required to arbitrate his ADA claim under a very general arbitration clause in a union-negotiated and union-signed CBA that contained no explicit incorporation of statutory antidiscrimination requirements. See id.

This case falls squarely within Wright. The CBA between the District and the union does not reference, much less explicitly incorporate, the ADA or other employment discrimination laws and standards into the arbitration provision or any part of the agreement. Nor does it specifically make compliance with federal anti-discrimination statutes an obligation under the agreement. This court finds nothing in the CBA that is sufficiently clear or explicit to be a valid union waiver of an employee's federal judicial forum under Wright. The District points to the anti–discrimination provision of the CBA, under which both parties agree not to discriminate against any employee based on, inter alia, age or handicap. However, Wright suggests that more is required, that there must be some explicit reference to or incorporation of federal statutory provisions and standards. See Wright, 119 S. Ct. at 396 (noting the absence of explicit incorporation of statutory anti-discrimination requirements). A provision in which both parties to the CBA merely confirm a commitment to their policies against discrimination does not satisfy Wright. In fact, the Court pointed to prior cases in which the presence of such a contractual anti-discrimination provision was insufficient to waive the judicial forum for statutory discrimination

claims. See id. at 396-97 (discussing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)). In short, there was no waiver consistent with Wright of Schumacher's right to a federal judicial forum for her ADA claim and therefore no requirement that she arbitrate this claim prior to coming to federal court.[4] Because there was no waiver, this court finds it unnecessary to reach or resolve the question of whether such a waiver could be enforceable. See Wright, 119 S. Ct. at 395, 397.

Waiver of § 1983 Claims

There is no post-Wright case law addressing the standard for determining whether a union waived the judicial forum for its members' federal constitutional claims. However, this court is of the view that the Wright standard applicable to waiver of statutory claims should be applicable to a union-negotiated waiver of constitutional claims brought pursuant to the vehicle of § 1983. Indeed, this court is hard-pressed to conceive of a logical basis for concluding that a union could waive the judicial forum for its members' Fourteenth Amendment claims more easily or with less explicit language than it could waive the forum for their ADA or other statutory claims. Thus, this court holds that a union-negotiated CBA requirement that employees waive a federal judicial forum and arbitrate federal constitutional claims must be explicit, particularly clear, and unmistakable. See Wright, 119 S. Ct. at 396. As the instant CBA makes no reference to or

[4] The District does not appear to argue that Schumacher must arbitrate her ADEA claim. However, this court would reach the same conclusion as to that statute. Wright spoke in terms of "claims of employment discrimination," Wright, 119 S. Ct. at 396, suggesting that all federal employment discrimination statutes, not only the ADA, should be governed by the "clear and unmistakable" waiver standard. Moreover, given the similar treatment of the ADA and ADEA, see Newman, 60 F.3d at 157, the same standard for waiver should apply to both. See Jupiter v. Bellsouth Telecomm., Inc., Civ. No. 99-628, 1999 WL 1009829, *6 (E.D. La. 1999) (applying Wright and declining to dismiss ADEA claim for failure to arbitrate pursuant to a CBA).

incorporation of the Fourteenth Amendment due process or equal protection clauses or to the applicable legal standards, there was no waiver of the federal judicial forum and no requirement that Schumacher arbitrate her constitutional claims.[5]

Sufficiency of Disability Discrimination Claims

The District next challenges the legal and factual sufficiency of the allegations in the Amended Complaint as to Schumacher's claims for disability discrimination and retaliation under the ADA and the PHRA. It must be determined if Schumacher would be entitled to relief under any reasonable reading of the pleadings, assuming the truth of all the factual allegations of the Amended Complaint, Alexander v. Whitman, 114 F.3d 1392, 1397-98 (3d Cir.) (citation omitted), cert. denied, 522 U.S. 949 (1997), and drawing all reasonable inferences favorably to Schumacher. Weiner, 129 F.3d at 315. Only if it is clear that no relief could be granted under any set of facts that could be proven consistent with those allegations may a complaint be dismissed. Alexander, 114 F.3d at 1398. As discussed supra, the substantive provisions of the ADA and PHRA are applied in the same manner. Therefore the pleading requirements should be the same. This court's conclusion as to the sufficiency of the allegations against the District under the ADA will control the same question as to disability discrimination under the PHRA. See Salley, 160 F.3d at 979-80 n.1.

The ADA establishes a general rule that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job

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[5] Other courts, pre-Wright, have held that such a waiver of a judicial forum for § 1983 claims, even if made, cannot be enforced. See Mellody v. Upper Merion Area Sch. Dist., Civ. No. 97-5408, 1998 WL 54383, *4-5 (E.D. Pa. 1998) (Dalzell, J.) (holding that an employee could not be required to arbitrate constitutional claims, based on the general prohibition of exhaustion requirements for § 1983 actions). This court need not reach that issue.

application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a); see Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2144 (1999); Gaul v. Lucent Tech., Inc., 134 F.3d 576, 579 (3d Cir. 1998). A "qualified individual with a disability" is defined as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); see Sutton, 119 S. Ct. at 2144; Gaul, 134 F.3d at 579.

To survive a Fed. R. Civ. P. 12(b)(6) motion, Schumacher must plead a prima facie case under the ADA by alleging: 1) she is a disabled person within the meaning of the ADA; 2) she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the District; and 3) she has suffered an otherwise adverse employment decision as a result of discrimination. Gaul, 134 F.3d at 580. The District does not challenge the sufficiency of the allegations on the second and third elements and a review of the Amended Complaint reveals that she has pled both points. As to the second prong, she alleges that she is certified and qualified to teach math in Pennsylvania and that she had been doing so with no negative reviews for the better part of fourteen years. As to the third prong, she alleges that the transfer was adverse, because it denied her the prestige and certain outside consulting opportunities that come with teaching math and that she has been subjected to assorted burdens in her current position.

The District challenges the Amended Complaint on the first element, whether Schumacher has sufficiently alleged that she is disabled within the meaning of the ADA. The statute defines disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2); see Sutton, 119 S. Ct. at 2144. Schumacher alleges that her ADHD is an impairment that substantially limits various major life activities and constitutes a disability either under subsection (A) or (C). This court considers each in turn.

Disability under § 12102(2)(A)

Last term, the Supreme Court held that whether a plaintiff is disabled under § 12102(2)(A) must be determined by reference to corrective measures. Thus, "if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures–both positive and negative–must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." Sutton, 119 S. Ct. at 2146. The Court held that an impairment constitutes a disability only where it presently, not potentially or hypothetically, substantially limits a major life activity. If a physical or mental impairment is corrected by medication or other measures, it perhaps no longer substantially limits a major life activity. Therefore, while such a plaintiff still has an impairment, she may not have a disability under the Act. See id. at 2146-47. The Sutton plaintiffs, whose vision could be made 20/20 or better with corrective measures, were not disabled under the ADA. Id. at 2146.

Schumacher suffers from ADHD, which she alleges, and unquestionably is, a mental impairment, one that, even with medication, will not be ended. (Am. Compl. ¶ 12). She also alleges that she is substantially limited in the activities of cognitive thinking, sleeping, and

eating, all of which this court accepts as being major life activities. See, e.g., Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 307 (3d Cir. 1999) ("We accept that thinking is a major life activity."); Presta v. Southeastern Pennsylvania Transp. Auth., Civ. No. 97-2338, 1998 WL 310735, *7 (E.D. Pa. 1998) (Yohn J.) (citation and internal quotation marks omitted) ("The court recognizes that the ability to sleep is a major life activity in that it is a basic, daily function[] affecting the general population."). However, Schumacher has pled that the impairment may be controlled with medication. (Am. Compl. ¶ 12).

Therefore, under Sutton, to determine whether her continuing impairment qualifies as a disability, this court must consider whether Schumacher's ability to engage in these major life activities is substantially limited by ADHD, even in its corrected state, that is, even when she properly takes her medication as prescribed. See Taylor, 184 F.3d at 308 ("[T]he central question, in light of Sutton . . ., is whether [plaintiff's] continuing impairment remained a 'disability' under the ADA by imposing substantial limitations even while treated."). If medication controls ADHD such that it enables Schumacher to think, sleep, and otherwise function as would the average person, just as corrective eyewear enables a person with myopia to attain 20/20 vision, Schumacher would not have a disability under § 12102(2)(A). However, this court is unable to say, at this stage, that ADHD, controlled by medication, still does not substantially limit Schumacher's ability to perform these major life activities and still does not render her disabled within the meaning of the ADA. See Taylor, 184 F.3d at 309 (denying summary judgment and finding issues of fact as to whether plaintiff continued to be substantially limited even while taking lithium to control bipolar disorder). The Amended Complaint alleges that Schumacher remains limited in these activities and those allegations are accepted as true for

present purposes. Weiner, 129 F.3d at 315. Schumacher sufficiently has pled a disability under § 12102(2)(A) and met the first prong of her prima facie case so as to survive a motion to dismiss.

Disabled under § 12102(2)(C)

Schumacher also alleges that the District regarded her as having an impairment that substantially limited her in major life activities, which is the third way a plaintiff may be disabled under the ADA. See Sutton, 119 S. Ct. at 2149; 42 U.S.C. § 12102(2)(C). This statutory definition applies in either of two situations: 1) a covered entity mistakenly believes that a person has a physical or mental impairment that substantially limits one or more major life activities or 2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. Id. at 2149-50. In both situations, it is necessary that a covered entity actually entertain misperceptions about the individual, either that the impairment exists when in fact it does not or that the impairment is substantially limiting when in fact it is not. Id. at 2150. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that it regards as substantially limiting. Id.

In what major life activity, if any, does the District regard Schumacher as being substantially limited? "When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." Sutton, 119 S. Ct. at 2151; see also Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 784 (3d Cir. 1998) (stating that plaintiff must show "a significant[] restrict[ion] in the ability 'to perform either a class of jobs or a broad range of jobs in various classes'"). In Sutton, the plaintiffs alleged that the airline mistakenly believed their poor eyesight substantially limited them in the major life activity of working by preventing them

from performing the essential functions of the job of global commercial airline pilot. Id. at 2143, 2150. However, exclusion from that single job was insufficient to state a claim under the ADA, because a number of other positions utilizing the plaintiffs' skills were available to them, such as regional pilot, pilot instructor, or commercial co-pilot. Id. at 2151. Because the plaintiffs' were not prohibited from obtaining these other aviation positions, they were not barred from the broad class or range of aviation jobs and therefore could not be substantially limited in the major life activity of working. Id.

The District argues that Sutton requires dismissal of Schumacher's disability claim under § 12102(2)(C) because she is regarded by the District only as being unable to perform the single job of math teacher, just as the plaintiffs in Sutton only were regarded as being unable to perform the single job of global pilot. The District argues that it does not regard her as unable to perform the functions of the broad job class of teacher and that she is not regarded as unable to teach other subjects, such as geography (which is how she currently is employed by the District), just as theSutton plaintiffs still would have been eligible for other positions within the broad class of aviation jobs. At the pleading stage, this argument fails for two reasons.

First, Schumacher does not allege that she was regarded as substantially limited in the major life activity of working, to which Sutton applies. Indeed, the Supreme Court at least questioned, without deciding, whether working properly qualifies as a major life activity. See Sutton, 119 S. Ct. at 2151 ("[T]here may be some conceptual difficulty in defining 'major life activities' to include work."). Rather, Schumacher alleges that she is regarded as being substantially limited in the major life activities of sleeping, cognitive thinking, and eating, which, as discussed supra, this court accepts as major life activities. Those are the major life activities

on which this court must focus analysis of her claim. See Mondzelewski, 162 F.3d at 784 n.4 (stating that a court only should consider whether a plaintiff is substantially limited in the major life activity of working if she is not substantially limited in any other major life activities). If Schumacher is able to establish that the District regarded her as substantially limited in any of them, she can establish a disability under § 12102(2)(C) and satisfy the first element of her prima facie case under the ADA.

Second, even assuming arguendo that the major life activity at issue is working and that working is a major life activity under the ADA, the Amended Complaint can be read as alleging that the District regarded her impairment as rendering her unable to perform the functions of teacher in any subject, a broad class or range of jobs that satisfies the standard reiterated in Sutton. The Amended Complaint suggests that Schumacher's transfer to teaching geography was a pretext, a first step towards ultimately removing her as a teacher because the District regarded her as substantially limited in her ability to function as a teacher generally. This is further reflected in the poor treatment she allegedly has suffered in her current position of geography teacher and the ways in which the District allegedly has interfered with her job performance, such as refusing to permit her to attend seminars to improve her teaching and failing to provide her with the necessary materials, time, space, and support. These allegations together, if proven, show that the District regarded Schumacher as unable to perform the functions of the broad job class of teacher. It is not clear that Schumacher will be able to prove these allegations, however they are sufficient to state a claim that she was regarded as substantially limited in the major life activity of working and therefore disabled under § 12102(2)(C). Therefore, Schumacher has sufficiently pled a disability under this section and has

stated a prima facie case under the ADA so as to survive a motion to dismiss.

Retaliation Under the ADA

The ADA prohibits "discriminat[ion] against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge . . . in any manner in an investigation, proceeding, or hearing." 42 U.S.C. § 12203(a); see Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997); see also 43 Pa. C.S. § 955(d) (making it an unlawful discriminatory practice to discriminate "against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge" under the act). At the pleading stage, to state a prima facie case of retaliation, the plaintiff must allege: 1) protected employee activity; 2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and 3) a causal connection between the employee's protected activity and the employer's adverse action. Krouse, 126 F.3d at 500 (citing Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997)). Schumacher's filing of the EEOC complaint unquestionably is protected activity, satisfying the first element.

The District alleges that Schumacher has not pled adverse action or causation, first because her transfer from teaching math to teaching geography was not adverse, and second because the transfer occurred prior to her filing the EEOC charge. However, the adverse activity in this count is not the initial transfer. Rather, the relevant conduct involves the District's allegedly discriminatory acts following her transfer, that is: refusing to consider her for new math-teaching positions on par with other applicants; refusing to allow her to attend seminars that would enhance her teaching performance; and failing to provide her with the materials, time,

space, and support necessary for her to perform her new job as geography teacher well and effectively, all of which other teachers received. (Am. Compl. ¶ 42). These actions allegedly occurred contemporaneously with or following her filing of the EEOC charge. Schumacher alleges that these actions have been taken in retaliation for her filing the discrimination charge. Therefore, Schumacher has pled all three elements of a prima facie retaliation claim and this count also survives the motion to dismiss.

Punitive Damages under the PHRA

Schumacher seeks punitive damages in this action. Punitive damages are available under the ADA for intentional discrimination where the employer acts with malice or reckless disregard for the employee's rights, see Kolstad v. American Dental Ass'n, 119 S. Ct. 2118, 2121 (1999), and under the ADEA. See Abrams v. Lightolier, Inc., 50 F.3d 1204, 1220 (3d Cir. 1995). The District does not argue otherwise. However, the Pennsylvania Supreme Court recently resolved the open question and held that punitive damages are not available under the PHRA. Hoy v. Angelone, 720 A.2d 745, 751 (Pa. 1998). That decision is, of course, conclusive of the question and binding on this court. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that federal courts sitting in diversity must apply the law of the state as declared by its highest court). Thus, Schumacher's request for punitive damages under the PHRA is dismissed with prejudice, although she may, upon proper proof, recover punitive damages under the ADA and ADEA.

Conclusion

For the foregoing reasons, the defendants' motion is granted in part and denied in part. The claims under the ADA (Count I) and ADEA (Count II) against Tinner are dismissed with prejudice. The claim for breach of contract (Count V) is dismissed without prejudice to

Schumacher's right to arbitrate the claim pursuant to the CBA. The request for punitive damages under the PHRA is dismissed with prejudice. All other claims and requests for relief remain in the case.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATTY L. SCHUMACHER	:	CIVIL ACTION
	:	
v.	:	
	:	
SOUDERTON AREA SCHOOL DISTRICT	:	NO. 99-1515
and LOWELL A. TINNER	:	

ORDER

AND NOW, this ___ day of January 2000, upon consideration of the Defendants' Partial Motion to Dismiss Plaintiff's First Amended Complaint and the arguments of the parties, for the reasons stated in the attached Memorandum, it hereby is ORDERED as follows:

1. As to the claim against defendant Lowell A. Tinner ("Tinner") individually under the Americans with Disabilities Act (Count I), the motion is GRANTED and the claim is DISMISSED WITH PREJUDICE.

2. As to the claim against Tinner individually under the Age Discrimination in Employment Act (Count II), the motion is GRANTED and the claim is DISMISSED WITH PREJUDICE.

3. As to the claim for breach of contract against all defendants (Count V), the motion is GRANTED and the claim is DISMISSED WITHOUT PREJUDICE to plaintiff's right to pursue the claim in arbitration pursuant to the Collective Bargaining Agreement.

4. As to the request for punitive damages under the Pennsylvania Human Relations Act, the motion is GRANTED and the request is DISMISSED WITH PREJUDICE.

5. In all other respects and as to all other claims and prayers for relief in the Amended Complaint, the motion is DENIED.

BY THE COURT:

_____
JAMES T. GILES C.J.

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to